

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

U S T A NATIONAL  
TENNIS CENTER, INCORPORATED  
Employer<sup>1</sup>

and

Case No. 29-RC-11748

LOCAL 74, UNITED SERVICE WORKERS UNION,  
INTERNATIONAL UNION OF JOURNEYMEN  
AND ALLIED TRADES  
Petitioner

**DECISION AND DIRECTION OF ELECTION**

USTA National Tennis Center Incorporated (“the Employer”) operates a year-round tennis facility in Flushing, New York. It provides tennis lessons, summer camp and special events, and annually hosts the U.S. Open tennis tournament. Local 74, United Service Workers Union, International Union of Journeymen and Allied Trades, filed a petition under Section 9(c) of the National Labor Relations Act (“the Act”), seeking to represent approximately 35 full-time and regular part-time, year-round employees in the Employer’s “tennis programs” department, including the tennis professionals/instructors, front desk attendants, and locker room attendants.<sup>2</sup>

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<sup>1</sup> The Employer’s name appears as amended at the hearing (Board Exhibit 2).

<sup>2</sup> The petitioned-for unit appears as stated at the hearing.  
Since the parties in this case refer to the tennis instructors as tennis “professionals” (or tennis “pros” for short), this Decision will also use the same phrase to describe them. However, using this phrase does not mean that those employees are “professional” as defined in Section 2(12) of the Act. In that regard, there is no evidence that they perform predominantly “intellectual” work, requiring “advance knowledge acquired by specialized intellectual study in an institute of higher learning.”

The Employer contends that the petitioned-for bargaining unit is inappropriate in two respects. First, the Employer contends that it would be inappropriate to exclude employees in the Employer's "facility operations" department -- including groundskeepers, cleaners/custodians, maintenance employees, mechanics and handymen -- from the unit. Second, the Employer contends that employees in both departments who are hired in the busy summer season are regular "seasonal" employees who must be included in the unit. Thus, the Employer alleges that the only appropriate unit would include the 35 year-round tennis program employees; two summer seasonal tennis professionals; approximately 10 year-round employees in the facility operations department; and approximately 230 summer seasonal employees in the facility operations department, for a total of approximately 277 employees.

The Petitioner contends that the summer employees should be excluded from the unit as "temporary" workers.<sup>3</sup> The Petitioner has also indicated its willingness to proceed to an election if the two summer tennis professionals are included in the unit herein, but not if the additional 240 year-round and summer employees from the facility operations department are included.

A hearing on these issues was held before Brent Childerhose, a Hearing Officer of the National Labor Relations Board ("the Board"). In support of its positions, the Employer called two witnesses to testify: managing director Daniel Zausner, and senior director for facility operations, Joseph Crowley. The Petitioner called front desk attendant Glen Prine to testify.

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<sup>3</sup> Both parties agree that employees who are hired for *only* two or three weeks during the U.S. Open tournament are excluded as temporary employees.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned Regional Director.

As discussed in greater detail below, I conclude that a bargaining unit limited to tennis department employees is an appropriate unit, and reject the Employer's argument that any appropriate unit must contain facility operations department employees.

Accordingly, since the facilities operations department will be excluded from the unit, I need not decide the temporary/seasonal issue in that department. However, I find that the summer tennis professionals are "seasonal" employees under Board law, and must be included in the appropriate tennis-department unit. I will therefore direct an election in a unit of all full-time and regular part-time tennis department employees, including both the year-round employees and the tennis professionals hired for the summer.

## **FACTS**

### **General background facts**

Unless otherwise indicated, the background facts are undisputed. The Employer has a 43-acre site in Flushing Meadows/Corona Park in Flushing (Queens), New York. The site is also known as the USTA Billie Jean King National Tennis Center. The site includes two outdoor tennis stadiums -- named respectively for Arthur Ashe and Louis Armstrong -- and a new indoor tennis building. The Arthur Ashe stadium is located on the westernmost side of the property, and the indoor building is located on the easternmost side. Front desk attendant Glen Prine estimated the distance between the two as "two city blocks." The Employer's managing director, Daniel Zausner, estimated that it takes two to five minutes to walk from the Ashe stadium to the indoor facility, depending on which exit is used. It appears from the record that the Louis Armstrong

stadium is located about 100 yards from the indoor facility, somewhere between the two ends of the site.

The site contains more than 40 tennis courts, including more than 30 outdoor (unroofed) courts and 12 indoor courts. The Employer's administrative offices, including Employer witnesses Zausner and Crowley's offices, are located in the Ashe stadium. The new indoor building, which opened in November 2008, contains the 12 indoor tennis courts, plus lockers rooms and offices. At the time of the hearing (early May 2009), Zausner testified that the Employer was finishing some construction in the indoor building; that the groundskeeping crew were housed in the Armstrong stadium temporarily; but that he expected them to move to the indoor facility, once the construction was finished.

There is no dispute that the size of the Employer's operation varies widely from season to season. From November to April, when the weather is too cold to play outdoors, the Employer uses the indoor building to give private tennis lessons. Zausner testified that the outdoor activity starts "ramping up" in April, and the Employer starts the gradual process of hiring more employees over the course of the summer. The Employer has summer tennis camps and programs from June to approximately mid-August. Then, the operation reaches a dramatic three-week peak before and during the U.S. Open tournament, from late August to mid-September. Zausner testified that the Employer hires more than 1,000 short-term employees for this time period, including not only tennis department employees and facility operations employees, but also ticket sellers and

takers, guest service personnel, 250 ball persons, and many others.<sup>4</sup> After the U.S. Open ends in September, the number of employees reduces again dramatically, and the Employer resumes its regular tennis programs. The Employer's other activities include tournaments, private parties and other special events.

In terms of the Employer's hierarchy, there are several departments which report to managing director Zausner, including: the petitioned-for tennis programs department (headed by Whitney Kraft), the operations department (headed by Joseph Crowley), and the ticket operations, special events and finance departments. (*See* Employer Exhibit No. 1, attached to this Decision as Appendix A.)<sup>5</sup> Zausner's office, Crowley's office, other administrative offices, and the events department are all located at the Ashe stadium. As noted above, the groundskeeping operation is housed at the Armstrong stadium, at least temporarily. The tennis programs department, including Whitney Kraft's office, are located in the indoor facility.

### **Tennis programs department**

This section describes the *year-round* operation of the tennis programs department, including the petitioned-for, year-round employees. Evidence regarding the additional employees who are hired during the summer (the alleged seasonal employees) is described separately below.

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<sup>4</sup> As noted above, the Employer gradually hires more and more employees over the course of the summer. The parties agree that employees who work for *only* three weeks for the U.S. Open are temporary employees who should not be included in any bargaining unit. The "seasonal" issue in the instant case revolves around employees who are hired earlier in the summer, and work for more than three weeks.

<sup>5</sup> References to the Employer's exhibit numbers are hereinafter abbreviated as "Er. Ex. #\_".

As stated above, the tennis programs department operates in the Employer's indoor facility. Its employees consist of tennis professionals, front desk attendants and locker room attendants.<sup>6</sup> Whitney Kraft is the director, overseeing the whole tennis department. He reports to managing director Zausner. Kraft also directly supervises the tennis professionals, with no intervening mid-level supervisor. Michael Colongione, the tennis program senior coordinator, is an intermediate supervisor for the front desk and locker room employees, including assigning work to them and writing their annual evaluations. Colongione, in turn, reports to Kraft.

Zausner testified he holds weekly management meetings for the tennis department, sometimes meeting with only Kraft, and other times meeting with both Kraft and Colongione. The meetings occur either in Zausner's office at the Ashe stadium, or in a tennis department office at the indoor building.

*Tennis professionals/instructors*

There are at least 17 year-round tennis professionals, including 10 who work full-time and at least 7 who work part-time. Their primary duty is to give tennis lessons. During the cold months, they teach on the 12 courts inside the Employer's indoor facility. Then during the warm months, they teach on both indoor and outdoor courts. Zausner testified that they spend virtually all of their work time on the courts, teaching and interacting with the "guests" (i.e., customers who are taking tennis lessons). They do not interact as much with other employees. They wear uniform shirts with the words "USTA Billie Jean King National Tennis Center" on them. As stated above, they report directly

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<sup>6</sup> The tennis department also employs two "coordinators" whose status is discussed *infra* at pp. 23-4.

to Whitney Kraft. Zausner testified that tennis professionals' starting wage is approximately \$12 per hour, but may be much higher, depending on the person's tennis skills and ability to attract new business.

*Front desk attendants*

There are approximately 9 year-round front desk attendants, including 3 - 4 who work full-time, and 5 - 6 who work part-time. (Some of them are also known as "reception attendants" or "guest specialists.") As their title indicates, they work primarily at the front desk/lobby area near the first-floor entrance to the Employer's indoor facility. Their duties include: answering the phones; transferring calls (switchboard function); booking the guests' lessons and courts; receiving the guests' payments for their lessons; data-processing the guests' payments and other tennis program information in the computer system; coordinating the tennis courts' schedules; and operating a light panel to turn the court lights on and off. Front desk attendant Glen Prine, who works the latest shift (4:00 p.m. to 12:00 midnight), testified that his duties also include preparing a daily "recap sheet" summarizing the payments received and other activity for that day.

Front desk attendants interact with guests on and off all day. Prine testified that he spends 95% of his work time at the front desk, although he sometimes goes to the courts (e.g., to tell a tennis instructor when a guest cancels a lesson). He also interacts with tennis professionals at the desk, such as when they report a spill on a court which must be cleaned by locker room attendants. Front desk attendants wear a uniform, consisting of a button-down shirt with the Billie Jean King insignia and khaki pants.

As stated above, front desk attendants report directly to Colongione, who in turn reports to Kraft. Colongione assigns tasks to the front desk attendants, writes their

evaluations, and decides on their vacation requests. Prine also stated that, if he has to call in sick, he calls Colongione.

Zausner estimated that the front desk attendants' starting wage is in the range of \$10 to \$12 per hour. Prine, who has worked as a front desk attendant there for 15 years, testified that he currently earns more than \$17 per hour.

#### Locker room attendants

The record indicates that there are approximately 4 full-time and 4 part-time locker room attendants. There is usually at least one male and one female attendant per shift. As their title indicates, they work primarily in the men's and women's locker rooms, which are located on the second floor of the indoor tennis facility. Locker room attendants assign lockers to guests; provide towels and toiletries to guests; remove the used towels; replenish the supply of clean towels; and clean the locker rooms and bathrooms. Zausner testified that their duties also include some cleaning in the indoor facility's first-floor lobby and main hallways, and Prine confirmed that he sees locker room attendants vacuuming and mopping the floor near the front desk. In addition, Zausner testified that locker room attendants are cross-trained to answer the phones, so they can help cover the front desk when a front desk attendant needs to step away for a few minutes. Similarly, Prine testified that locker room attendants cover for him when he needs to leave the front desk. Finally, Zausner testified that during the spring and fall seasons, locker room attendants also help clean the outdoor bathrooms.

Zausner generally stated that locker room attendants interact with guests, although less than the tennis professionals and front desk attendants do. Locker room attendants'

uniforms are similar to the front desk attendants' uniform, although Prine said their shirt is "slightly different."

As stated above, the locker room attendants are directly supervised by Michael Colongione. Prine testified that front desk and locker room attendants generally attend the same departmental meetings, although sometimes the front desk attendants also have their own separate meeting.

Zausner testified that the locker room attendants' starting wage is within the range of \$8 to \$10.

#### **Facility operations department**

This section describes the *year-round* function of facility operations employees who (the Employer contends) must be included in any appropriate with the tennis department employees. This section does not include specific information regarding the facility operations' *summer* employees who (the Employer contends) must also be included as "seasonal" employees. Given the ultimate conclusion herein -- that the facility operations employees do not share a sufficient community of interest to mandate their inclusion in the petitioned-for unit -- the seasonal/temporary issue need not be addressed in that particular department.

The facility operations department generally cleans, maintains, repairs and landscapes the Employer's entire site, including the tennis courts. Joseph Crowley, who reports to Zausner, is senior director for the department. Crowley, in turn, oversees

facility operations<sup>7</sup> manager Wilfred Albino and courts and grounds manager Ryan Ferarra. (See Appendix A.) Crowley's department's office is located in the Ashe stadium, in a separate area from Zausner's and the other administrative offices there.

Crowley testified that the year-round operation includes a total of 10 employees: seven full-time and three part-time.<sup>8</sup> The record does not indicate the exact breakdown between the two divisions.

Albino's facility operations crew is also housed in Ashe stadium. The record indicates that the year-round crew includes two custodians/cleaners (both part-time) and a few mechanics/handyman and/or maintenance employees.

As their title indicates, the cleaners clean the Employer's site, including the indoor facility. Zausner stated that, although locker room attendants clean the locker rooms and some common areas of the indoor building, it is not their job to clean the entire building. The custodians do more "heavy duty" cleaning and special projects like cleaning the large wall of windows at the indoor facility entrance. During the busy summer season, the facility operations cleaners also take over (from the locker room attendants) the cleaning

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<sup>7</sup> It should be noted that the Employer uses the phrase "facility operations" for both Joseph Crowley's department and Wilfred Albino's sub-section of the department. Specifically, Crowley is the senior director of facility operations, which includes all the physical functions: cleaning, maintenance, repair, courts and groundskeeping. Wilfredo Albino is the manager of facility operations, which is a subdivision for the cleaning, maintenance and repair crew only. (Ryan Ferrara's crew is a separate subdivision, for the courts and grounds keeping employees only.) To avoid confusion between the two facility operations levels, this Decision will sometimes use the individuals' names, such as "Crowley's department" or "Albino's crew."

<sup>8</sup> The facility operations employees also include a position known as "key man" (although, presumably, the job is open to women as well). The key man works out of the Ashe stadium, where a secure room contains hundreds of keys for all the locks around the site. The key man's job is to open and close various locks on the site, as needed. However, this position is not year-round. Zausner testified that managers deal with the locks during the slow months. At some point in the summer (not specified on the record), the Employer hires at least one key men. By the time of the U.S. Open, the Employer may employ as many as four or five key men, and then lays them off in September. Thus, the key man position is not year-round.

of bathrooms adjacent to the outdoor courts. The other facility operations employees do a combination of scheduled maintenance (including maintaining forklifts, golf carts, scrubbing machines and other equipment) and specific repairs as needed (such as repairing locks or minor leaks, replacing light bulbs or ceiling tiles, etc.). They also help set up special events by moving and setting up tables and chairs.

Ferrara's courts and grounds crew includes three full-time groundskeepers, supervised by Ryan Ferrara. The crew is temporarily housed at a shop in Armstrong stadium, although Zausner testified that the shop will eventually be moved to the indoor facility after the construction there is finished. This crew's duties include cleaning the indoor and outdoor courts with a specialized sweeping machine. The keepers receive training to operate this machine carefully, to avoid making divots in the surface. They also inspect and repair the courts' nets and screens on a regular basis. In addition, they resurface the courts annually, and do outdoor landscaping.

The Employer pays the facility operations' employees on an hourly basis. Employees clock their time by "swiping" identification cards in and out. Zausner testified that facility operations employees normally swipe in wherever they are "housed" and report upon arrival (i.e., Albino's facility operations office or the grounds crew shop), although they may swipe in at other locations when necessary. After swiping in, they spend most of the day working at various locations within the Employer's site.

Although it is not entirely clear from the record, it appears that the courts and grounds crew's starting wage is more than \$8 per hour. Zausner stated that Albino's facility operations employees earn "up to" \$12 to 13 per hour, depending on their employment duration.

Zausner testified that facility operations' employees (Crowley's whole department) have contact with customers. For example, they all have to know the entire facility, in case a customer asks them for directions. Nevertheless, Zausner conceded that facility operations employees have less contact with customers than the tennis department employees. Prine testified that facility operations employees wear uniform T-shirts which identify their function (i.e., groundskeeper, custodian, etc.). They are different uniforms than those worn by tennis department employees.

**Other evidence re: community of interest between the two departments**

As stated above, tennis department employees and facility operations employees are "housed" at different locations at the Employer's site. The record indicates that tennis department employees work primarily in the indoor building, although tennis professional also teach at outdoor courts in warm weather. Front desk attendant Prine testified that his duties keep him at the front desk. He further stated that he spends no time at the Armstrong stadium and "almost no" time at the Ashe stadium. Nevertheless, it is undisputed the facility operations employees work all over the Employer's 43-acre site, including the indoor building. Crowley testified that facility operations employees go to the indoor building every day. The Employer's witnesses gave some specific examples of contact between employees in the two departments, either in person in the indoor building, or by phone or radio.

For example, Zausner testified that the courts- and grounds-keeping employees work in the indoor facility when they clean and maintain the courts there. Zausner estimated that they do so at least three or four times per week, possibly up to every day, depending on the courts' usage. He further stated that the groundskeepers specifically

interact with the front desk attendants on those occasions, to coordinate with the day's schedule of tennis lessons. (Obviously, it is preferable to clean particular courts when they are not scheduled for use.) Likewise, when the courts need to be resurfaced annually, the groundskeepers and tennis department employees need to coordinate the indoor courts' schedules. Zausner also added that when Ferrara's crew members move to the indoor facility, they will be a "daily presence" there.

Both Zausner and Crowley testified that the tennis department's front desk attendants contact the facility operations department when they need to ask for a repair or cleaning task, although front desk attendant Prine disputed their testimony. According to Zausner and Crowley, the Employer's policy is that front desk attendants should notify their own supervisor (Colongione) first if something in the indoor building "needs attention" (e.g., light bulb replacement). Then Colongione himself should contact the facility operations department. The supervisor can either make a written request for repair (a "ticket"), or call by phone or radio. Nevertheless, Zausner and Crowley stated, front desk attendants do not always follow the policy. They sometimes call or radio the facility operations supervisors directly, for example, by calling Wilfred Albino for a repair or cleaning the building, or by calling Ryan Ferrara to repair or clean the tennis courts. Zausner testified that front desk attendants sometimes even contact the groundskeeping employees themselves, for example, if Ferrara is not available. However, he neither gave any examples of when this has happened, nor estimated how often it occurs. In addition, Zausner testified that he has seen repair tickets that were filled out by tennis department employees, although no such tickets were introduced as

evidence. Eventually, Crowley or one of the facility operations supervisors (Albino, Ferrara) distributes the repair assignments to facility operations employees.

Front desk attendant Prine confirmed that he was notified of the Employer's policy against tennis department employees calling the facility operations department directly, as opposed to going through a supervisor. As stated above, Prine works from 4:00 p.m. to 12:00 midnight. His supervisor (Colongione) usually leaves at around 5:00 (sometimes later), so they overlap only for an hour or so. Prine testified that if a cleaning or repair issue arises *before* Colongione leaves, he notifies Colongione first. If such an issue arises *after* Colongione leaves, then Prine is allowed to call the facility operations department directly. Whenever Prine contacts facility operations after 5:00 p.m., he then leaves a message for Colongione after the fact, informing him about the call. Prine further testified that he has called facility operations directly only "one or two" times when Colongione was present; on those occasions, he talked to that department's administrative assistant, Terri Arnold, who answered the phone. Prine stated that he does not directly contact the groundskeepers, custodians and maintenance employees for that purpose. In fact, Prine stated that he "very rarely" communicates with those employees.

As for locker room attendants, Zausner testified somewhat vaguely that the most senior locker room attendant, Carl Munnerly, "interacts" with the facility operations department. For example, Zausner said, Munnerly "might" go to get more towels at the Ashe stadium, but he did not quantify how often this happens. Crowley stated that Munnerly has contacted him "many times," and that other locker room attendants contact him "occasionally," but he did not give specific examples. Prine testified that he has not seen much interaction between the locker room attendants and the facility operations

employees although, admittedly, they work only during the first half of his shift (until about 8:00 p.m.).

The record contains little to no evidence that tennis professionals have direct contact with the facility operations employees. For one thing, the courts- and grounds-keepers try to avoid cleaning or maintaining particular tennis courts while the instructors are using the courts to give lessons. Unlike the front desk attendants, tennis instructors do not have a radio. Prine testified that, although he sees regular interaction among employees in his own department, he does not see as much interaction between tennis employees and facility operations employees.

The record indicates some overlap in the cleaning duties of locker room attendants and custodians. As stated above, locker room attendants also help clean the bathrooms near the outdoor courts during the spring and fall, whereas the custodians take over that task in the summer. Zausner stated that senior locker room attendant Carl Munnerly used to report to Wilfred Albino in facility operations, back when they were in the Employer's old indoor building. However, there is no evidence that locker room attendants and custodians substitute for each other on any regular basis and, as discussed below, they have different supervisors.

The Employer's evidence did not show any regular transfers (permanent) or substitution (temporary) between employees in the two departments. Zausner conceded that grounds crew employees do not substitute for tennis professionals or front desk attendants. He stated somewhat vaguely that grounds employees "might" work as locker room attendants (no specific examples), but that the handymen or mechanics do not. Crowley did not know whether any tennis department employees have transferred to

facility operations, or vice versa. (There was some testimony regarding transfers to the events department, but such evidence has no bearing on the issue herein.).

Likewise, the record contains little to no evidence that tennis employees and facility operations employees share common supervision. Both Zausner and Crowley stated that the facility operations supervisors (Albino, Ferrara, Crowley) do not direct, discipline or otherwise supervise any tennis department employees. Locker room attendants, whose cleaning duties are similar to the custodians, are not supervised by Albino. Prine's testimony confirmed that he does not receive assignment or directions from facility operations supervisors. Likewise, Crowley stated that the tennis department supervisors (Colongione, Kraft) do not supervise facility operations employees.

The record further indicates that employees receive some common training, such as safety training. However, the other types of training are separate for each group, depending on their specific responsibilities. For example, facility operations employees are trained to use the court-sweeper machine. Front desk attendants receive computer training. Zausner testified that tennis professionals receive training throughout the year, including workshops, recertification training and special tennis events across the country.

The Employer submitted evidence that all employees are subject to the same human resource policies. All full-time, year-round employees receive the same employee handbook. They undergo the same annual evaluation process. Specifically, each supervisor writes an evaluation for the employees in that department, and makes a recommendation as to whether each employee should receive a wage increase. Zausner later reviews the supervisors' recommendations and makes the final decisions. Wages for both departments' employees start in a similar range of \$8 to \$12 per hour, although

experienced tennis professionals may earn much more. Full-time, year-round employees in both departments receive the same benefits, and part-time employees in both departments do not receive benefits.

Finally, as for management meetings, Zausner testified that he meets with the tennis and facility operations managers as a group once per month. But there is no evidence that employees in the two departments attend meetings with each others. Crowley conceded that the tennis department employees do not attend his meetings with facility operations employees.

#### **Discussion of the community of interest between the two departments**

It is well established that a certifiable bargaining unit need only be *an* appropriate unit, not the most appropriate unit. Morand Bros. Beverage Co., 91 NLRB 409 (1950), *enf'd.* 190 F.2d 576 (7th Cir. 1951); Omni-Dunfey Hotels, Inc., d/b/a Omni International Hotel of Detroit, 283 NLRB 475 (1987); P.J. Dick Contracting, 290 NLRB 150 (1988); Dezcon, Inc., 295 NLRB 109 (1989). The Board's task, therefore, is to determine whether the petitioned-for unit is an appropriate unit, even though it may not be the *only* appropriate unit unit. The Board has stated that, in making unit determinations, it looks "first to the unit sought by the petitioner. If it is appropriate, our inquiry ends. If, however, it is inappropriate, the Board will scrutinize the employer's proposal." Dezcon, Inc., *supra*, 295 NLRB at 111. Thus, the unit requested by a petitioning union is the starting point for any unit determination. In assessing the appropriateness of any proposed unit, the Board considers such community-of-interest factors as employee skills and functions, degree of functional integration, interchangeability and contact among employees, and whether the employees have common supervision, work sites,

and other working terms and conditions. Contrary to assertions in the Employer's post-hearing brief, the Act does not require unions to choose the ultimate unit, or the largest possible unit. Overnite Transportation Co., 322 NLRB 723 (1996).

Bearing these principles in mind, I find that the petitioned-for unit of tennis department employees constitutes an appropriate bargaining unit by itself, and need not include facility operations employees. I find that the Employer has not shown that the two departments share such a strong community of interest so as to render the petitioned-for unit inappropriate.

Specifically, the record indicates that the two groups of employees perform different kinds of work, requiring different types of training and equipment. Tennis department employees' work is centered on providing tennis lessons, and entails significant contact with customers. The front-desk attendants' work is closely integrated with the tennis instructors' work, such as interacting with the same customers to schedule their lessons and courts, and providing all the related clerical and data-processing support. The locker room attendants also work closely with those same customers, assigning lockers to them and giving them towels, and covering the front desk on occasion. The skills required in this department -- tennis teaching skills for the instructors, computer skills for the front desk attendants, and customer relations skills for all three classifications -- have very little to do with the facility operations employees' skills. The latter group's work is primarily physical or manual labor, requiring the use of different types of cleaning equipment and repair equipment from the equipment used by the tennis department employees. Furthermore, the record indicates that, to the extent that facility

operations employees have any interaction with customers, it is far less interaction than tennis employees have.

In addition, tennis department employees work primarily in the indoor facility, with their own supervisors' offices located in the same building. By contrast, facility operations employees and their supervisors are housed at other locations (Ashe and Armstrong stadiums) and work all over the Employer's 43-acre site. Admittedly, the facility operations employees work in the indoor building whenever they come to do their cleaning, maintenance and repair work there. But the record neither indicates how much time they spend there, nor demonstrates any significant contact between the two groups while they are there. For example, the cleaners try to avoid cleaning the courts where the tennis instructors are working. The record contains no evidence of contact between tennis instructors and facility operations employees. Zausner testified that the cleaners have some contact with the front desk attendants when checking the daily court-use schedule, but the testimony does not show this to be anything more than a brief encounter. For his part, Prine stated that it is "very rare" for him to communicate with facility operations employees, even during the first part of his shift. Finally, although locker room attendant Munnerly "might" get towels from the Ashe stadium on occasion, there is no evidence that tennis department employees have regular or substantial contact with facility operations employees outside of the indoor facility.

In addition, although the Employer's witnesses stated that tennis department employees sometimes contact the facility operations department to request a cleaning or repair task at the indoor building, there is very little evidence of direct contact between the rank-and-file employees for this purpose. The Employer has clearly expressed its

preference that tennis department employees should inform their own supervisors to handle such requests, rather than calling facility operations directly. Employer-witness Zausner claimed that tennis employees sometimes contact groundskeepers themselves, but he gave no specific examples to substantiate this claim or to show that it occurs on a regular basis. Prine stated that, on those occasions when he himself must call facility operations department (e.g., after his own supervisor leaves), he usually talks to a supervisor or administrative assistant.

There is no evidence that tennis department employees and facility operations employees ever interchange or substitute for each other, or transfer between the two departments. This is, at least in part, due to the separate skills and training of the different classifications. For example, facility operations employees do not know how to teach tennis or to operate the Employer's data-processing system, and presumably the tennis department employees do not know how to operate the cleaning equipment. Zausner conceded that grounds crew employees do not substitute for tennis professionals or front desk attendants. He stated somewhat vaguely that grounds employees "might" work as locker room attendants, but that the handymen or mechanics do not. Crowley did not know whether any tennis department employees have transferred to facility operations, or vice versa.

Of particular importance is the separate supervision for the two departments' employees. The record clearly indicates that the two levels of tennis department supervisors (Colongione, Kraft) are separate from the two levels of facility operations supervisors (Ferrara, Albino, Crowley). (See Er. Ex. 1.) Zausner and Crowley expressly conceded that the tennis department supervisors do not supervise facility operations

employees, and that the facility operations supervisors do not supervise tennis department employees. Even the locker room attendants and custodians, who both perform cleaning duties, do not share common supervision. Furthermore, employees do not attend the same supervisory department meetings as each other. The only common supervision or management exists at the very top level, by virtue of the fact that Kraft and Crowley both report to managing director Zausner -- three levels up from rank-and-file employees in the Employer's supervisory hierarchy. The Board has emphasized that employees' immediate supervisors -- who give them direction on a day-to-day basis, and would likely address their immediate grievances -- have greater bearing on their interests than upper-level management. Omni-Dunfey Hotels, Inc., d/b/a Omni International Hotel of Detroit, *supra*, 283 NLRB 475, fn. 1 (1987). Thus, this factor strongly supports a finding that the petitioned-for tennis department employees have their own interests, separate and distinct from other employees' interests. The Employer's assertions that all employees share common labor policies, a common handbook and common benefit policies do not outweigh the separate identity or coherence of tennis employees as a unit.

Another relevant consideration is the Petitioner's desire or extent of organization although, under Section 9(c)(5) of the Act, it cannot be a controlling factor. In this case, based on *all* of the above factors (different duties and skills, different supervision, in large part different work areas, lack of substantial contact or interchange, plus the fact that the Petitioner seeks only to represent tennis department employees at this time), I conclude that the petitioned-for tennis department employees constitute an appropriate unit for collective bargaining purposes.

It bears repeating that the Act does not require unions to choose the ultimate unit, or the largest possible unit. Overnite Transportation Co., *supra*, 322 NLRB 723 (1996). Section 9(b) of the Act expressly states that an appropriate unit may be an employer-wide unit, plant unit “*or subdivision thereof*” (emphasis added), and the Board has repeatedly recognized separate department units to be appropriate in countless circumstances.

Contrary to assertions in the Employer’s brief, although the Board avoids undue “proliferation” of units when appropriate, the Board does not have a general preference for larger units to avoid such “proliferation.” For example, the Employer repeatedly cites Michigan Wisconsin Pipe Line Co., 194 NLRB 469 (1971), for the proposition that “the Board is reluctant to fragmentize employees.” However, in that case, the Board was referring to an established preference for systemwide units in *public utility industries* in particular. *See generally* Colorado Interstate Gas Co., 202 NLRB 847 (1973). Such a preference does not necessarily apply to other industries, such as the sports business involved herein. Similarly, the Employer cites Gray Drug Stores, 197 NLRB 924 (1972) for the proposition that a “single-plant or single-store unit is presumptively appropriate.” However, the Board in that case was referring to the presumptive appropriateness of a single-store unit in retail chain stores, *as opposed to a multiple-store unit*. That presumption has nothing to do with a store-wide unit versus a smaller, departmental unit. In any event, the Employer does not propose a facility-wide unit as the only appropriate unit. Rather, the Employer proposes a unit limited to two departments, excluding the Employer’s other departments (such as events and ticket operations). There is no “presumption” in Board law that two out of several departments constitute an appropriate

unit for collective bargaining purposes, and the Employer has quoted certain other presumptions which do not apply to the facts of this case.

Another case cite by the Employer, J.C. Penney Co., Inc., 328 NLRB 766 (1999), is also distinguishable. The petitioner in that case sought an election in a unit of customer relations employees, shipping employees and others employed at a catalog-order fulfillment center, but excluding the telemarketing employees. The Board rejected the petitioner's exclusion of the telemarketing employees. However, the community of interests among those groups of employees was much stronger than that in the instant case. Specifically, the J.C. Penney employees had more common skills and functions, stronger integration with each other within the employer's overall operation, and "substantial" contact and interchange with each other, including "routinely" transferring employees among departments and "bumping" employees between different departments after layoffs. Those common elements do not exist in the instant case.

In sum, I have found that the petitioned-for tennis department employees have sufficiently separate interests from other employees to constitute their own, appropriate bargaining unit. That does not necessarily mean that other bargaining units (e.g., a facility-wide unit) might not be appropriate as well. However, I find that the Petitioner here has chosen *an* appropriate unit, and that the Employer has not met its burden of proving that the exclusion of facility operations employees renders the petitioned-for unit inappropriate. Accordingly, I will direct an election below in a unit limited to tennis department employees.

It should also be noted that the tennis department also employs two "coordinators," Minnie Johnson and Reiko Giffords, who work under NTC Tennis

Programs Director, Tina Tap, who in turn reports to Whitney Kraft. (*See* Er. Ex. 1; Er. Ex. 3 also classifies Minnie Johnson as an “administrative assistant.”) The parties did not expressly take any positions at the hearing regarding the coordinators’ inclusion or exclusion from the unit, and there is very little record evidence regarding their work. Zausner briefly described Johnson as a full-time coordinator who helps Tap with “all the sales of tennis programs.” Zausner stated that Reiko Gifford “wears two hats,” working both as a coordinator under Tap, and as a tennis instructor. Neither party claimed that the coordinators are statutory supervisors, guards, confidential employees or possess any other status disqualifying them from inclusion in the tennis department unit. Accordingly, since they appear to be regular tennis department employees, it makes sense to include them in the tennis-department-wide unit. I will therefore include them in the voting unit below.

#### **Seasonal tennis employees**

In the tennis department, the Employer alleges that tennis professionals hired for the summer are “seasonal” employees with a reasonable expectation of future employment, and therefore must be included in the petitioned-for unit. Both parties agree that short-term tennis department employees – about 12 front desk and locker room attendants who are hired for *only* the three weeks during the U.S. Open tournament – are temporary employees who need not be included.

As stated above, summertime is the Employer’s busiest season, due in part to the warm weather allowing outdoor play, and to the children’s summer camp programs which start after the school year ends.

Zausner testified that the Employer usually hires two tennis professionals each summer, from approximately late May to early August, to teach in the Employer's summer camp classes. Although their weekly work schedule is not clear from the record, Zausner states that these instructors work more hours in the summer than some of the regular part-time instructors work all year.

The summer instructors perform the same teaching duties as the year-round instructors, using the same special skills, at the same indoor and outdoor courts. The same supervisor, Whitney Kraft, supervises them.

The re-hire rate for the summer tennis professionals has essentially been 100% for the past few summers. Specifically, Crowley testified that Alissa Morra has worked for the Employer for the past two years; this summer will be her third. The other summer instructor, Nick Rose (who teaches the "accelerated" students) has worked for the Employer every summer for several years. The Employer pays them, respectively, \$18 and \$27 per hour. There is no dispute that the summer professional do not receive employment benefits, similar to the part-time, year-round employees. The only employees who receive benefits are the full-time, year-round employees.

#### **Discussion of "seasonal" issue**

In deciding whether to include seasonal employees in a bargaining unit, the Board assesses their expectation of future employment, based on the size of the area labor force, the stability of the employer's labor requirements and the extent to which it is dependent on seasonal labor, the actual re-employment season-to-season of the worker complement, and the employer's recall or preference policy regarding seasonal employees. L & B Cooling, Inc., 267 NLRB 1 (1983); Maine Apple Growers, Inc., 254

NLRB 501, 502 (1981). When employers actually re-employ a high percentage of the previous season's employees, the "returnees" are more likely to be found as regular, seasonal employees with a reasonable expectation of future employment. Tol-Pac, Inc., 128 NLRB 1439 (1960)(at least 50% worked in previous year); Baumer Foods, Inc., 190 NLRB 690 (1971)(69% returnees in 1969, and 54% in 1970). Furthermore, an employer who repeatedly draws from the same, relatively small labor pool (for example, employees with unusual skills) is more likely to hire the same individuals again in future seasons, compared to an Employer who draws from a large or amorphous labor pool. United Telecontrol Electronics, Inc. et al., 239 NLRB 1057 (1978).

Ultimately, the Board finds employees who have a reasonable expectation of future employment with the employer to be "regular" seasonal employees, and are included in the unit. By contrast, those who have no reasonable expectation of future employment are found to be "temporary" or "casual" seasonal employees, and are excluded from the unit. A related issue concerns the *timing* of an election in a seasonal industry. Where regular seasonal employees are found eligible to vote, the election must be held at or near the seasonal peak. Kelly Brothers Nurseries, Inc., 140 NLRB 82, 86-7 (1962).

In the instant case, the record shows that the Employer has a recurring dependence on seasonal labor. Every year, the Employer must hire additional employees to handle the busy summer-camp season. The record also indicates that the Employer keeps in contact with employees from previous years, in order to contact them for re-employment. In fact, for the tennis professionals specifically, the Employer has actually re-hired the same two individuals for three or more summers. Thus, those employees have not only a

reasonable expectation of future employment, but also the actual experience of re-employment. Those factors weigh heavily in favor of finding the employees to be regular seasonal employees. The record also indicates that summer tennis instructors perform the same duties as the year-round instructors, using the same specialized skills, and are supervised by the same supervisor.

Based on the foregoing, I conclude that the tennis professionals/instructors hired by the Employer during the summer-camp season are regular, seasonal employees, not just temporary or casual employees. I will therefore include them in the unit of tennis program employees in the election directed below. I further note that, since this Decision is issuing during the summer season, when the seasonal tennis instructors are available to vote if they so choose, this is an appropriate time to hold an election.

### **CONCLUSION AND FINDINGS**

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.
2. The record indicates that USTA National Tennis Center Incorporated ("the Employer") is a domestic corporation, with its principal office and place of business located at Flushing Meadows Corona Park in Flushing, New York. The parties stipulated that during the past year, which period represents its annual operations generally, (1) the Employer derived gross annual revenues in excess of \$500,000; and (2) the Employer purchased and received at its Flushing, New York facility supplies and materials valued in excess of \$5,000 directly from entities located outside the State of New York.

Based on the foregoing, I find that the Employer is engaged in commerce within the meaning of the Act. It will therefore effectuate purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated that Local 74, United Service Workers Union, International Union of Journeymen and Allied Trades (“the Petitioner”) is a labor organization as defined in Section 2(5) of the Act. The Petitioner claims to represent certain employees of the Employer.

4. A question concerning commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. Based on the foregoing, I have found that the following employees constitute a unit appropriate for the purposes of collective bargaining:

All full-time and regular part-time employees employed in the Employer’s tennis programs department at the Employer’s Flushing, New York facility, including tennis professionals/instructors; regular, seasonal summer tennis professionals/instructors; front desk attendants (a.k.a. reception attendants, guest specialists); locker room attendants; and coordinators; but excluding all facility operations department employees, temporary employees, confidential employees, guards and supervisors defined in Section 2(11) the Act.

### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether they wish to be represented for purposes of collective bargaining by Local 74, United Service Workers Union, International Union of Journeymen and Allied Trades. The date, time,

and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

### **Voting Eligibility**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are employed in the unit may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### **Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with

them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Two MetroTech Center, 5th Floor, Brooklyn, New York 11201, on or before **July 9, 2009**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (718) 330-7579. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

#### **Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) working days prior to the date of the election. Failure

to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **July 16, 2009**. The request may **not** be filed by facsimile.

The parties are advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file the above-described Request for Review electronically, please refer to the guidance which can be found under "E-Gov" on the National Labor Relations Board website: [www.nlr.gov](http://www.nlr.gov).

Dated: July 2, 2009.

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Alvin Blyer  
Regional Director, Region 29  
National Labor Relations Board  
Two MetroTech Center, 5th Floor  
Brooklyn, New York 11201